RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

ORIGINAL

STEPHEN A. ECENIA
JOHN R. ELLIS
KENNETH A. HOFFMAN
THOMAS W. KONRAD
MICHAEL G. MAIDA
MARTIN P. McDONNELL

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

J. STEPHEN MENTON
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE

GOVERNMENTAL CONSULTANTS
MARGARET A. MENDUNI
M. LANE STEPHENS

April 18, 2001

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Ms. Blanca S. Bayo, Director
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2540 Shumard Oak Boulevard
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Tallahassee, Florida 32399-0850

HAND DELIVERY

Re: Docket No. 000075-TP

Dear Ms. Bayo:

Enclosed herewith for filing in the above-referenced docket on behalf of AT&T Communications of the Southern States, Inc., TCG South Florida , Global NAPS, Inc., MediaOne Florida Telecommunications, Inc., Time Warner Telecom of Florida, LP, Florida Cable Telecommunications Association, Inc., Florida Competitive Carriers Association, WorldCom, Inc. and e.spire Communications, Inc. are the following documents:

1. Original and fifteen copies of the Joint Posthearing Brief; and

2. A disk in Word Perfect 6.0 containing a copy of the Brief.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

Sincerely,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate)
methods to compensate carriers for) Docket No. 000075-TP
exchange of traffic subject to Section 251)
of the Telecommunications Act of 1996.) Filed: April 18, 2001
)

JOINT POSTHEARING BRIEF OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., TCG OF SOUTH FLORIDA, MEDIAONE FLORIDA TELECOMMUNICATIONS, INC., GLOBAL NAPS, INC., TIME WARNER TELECOM OF FLORIDA, LP, FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION ALLEGIANCE TELECOM OF FLORIDA, INC., E.SPIRE COMMUNICATIONS, INC. AND WORLDCOM, INC.

AT&T Communications of the Southern States, Inc., TCG of South Florida, MediaOne Florida Telecommunications, Inc., Global NAPS, Inc., Time Warner Telecom of Florida, LP, Florida Cable Telecommunications Association, Inc., the Florida Competitive Carriers Association, Allegiance Telecom of Florida, Inc., e.spire Communications, Inc. and WorldCom, Inc., hereinafter referred to collectively as the "Joint ALECs," by and through their undersigned counsel and pursuant to Rule 28-106.215, Florida Administrative Code, and Order No. PSC-00-2229-PCO-TP issued November 22, 2000, hereby file their Joint Posthearing Brief.

Introduction

The only appropriate intercarrier compensation mechanism for the termination and transport of ISP-bound calls is a symmetric rate based on the ILEC's prevailing TELRIC costs. This will create incentives for continued reduction in the cost of call termination by both ALECs and ILECs alike, and bring benefit to Florida's end users by allowing innovative and economical services.

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Argument

Issue 1(a): Does the Commission have jurisdiction to adopt an intercarrier compensation mechanism for delivery of ISP-bound traffic?

Issue 1(b): If so, does the Commission have the jurisdiction to adopt such an intercarrier compensation mechanism through a generic proceeding?

ALECs' Position: *Yes. The Telecommunications Act of 1996, the FCC and federal court rulings interpreting the Act, and Florida law clearly authorize the Commission to adopt an intercarrier compensation mechanism for delivery of ISP-bound traffic in a generic proceeding.*

Florida Law

Pursuant to Chapter 364, Florida Statutes, the Florida Legislature has empowered this Commission with exclusive jurisdiction to promote competition by encouraging new entrants into the Florida local telecommunications market and by encouraging a wide availability of new and innovative services from local providers. See Fla. Stat. §364.01(4)(d), (e). More specifically, Section 364.162(1) authorizes the Commission to establish rates, terms and conditions for interconnection between local exchange companies ("LECs"). The Commission has previously exercised this authority to establish interconnection rates for LECs in a generic docket. See Order No. PSC-96-0445-FOF-TP issued March 29, 1996 in Docket No. 950985-TP.

The Commission's exercise of jurisdiction over the delivery of ISP-bound traffic dates back to 1989. In Order No. 21815, the Commission concluded that end user access to information service providers, which include ISPs, is by local service[1]. Some ten years later, the Commission cited

[1] Investigation into the Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, Order No. 21815 issued September 5, 1989 in Docket No. 880423-TP.

BellSouth's statements and position in that 1988 proceeding in determining, as it would time and again, that the definition of "Local Traffic" in interconnection agreements included ISP traffic:

> In the (1988) proceeding, BellSouth's own witness testified that:
>
> [C]onnections to the local exchange network for the purpose of providing an information service should be treated like any other local exchange service. (Order 21815, p. 25)
>
> * * *
>
> The Commission also found that calls to ISPs should be viewed as jurisdictionally intrastate local exchange calls terminating at an ISP's location in Florida. BellSouth's position, as stated in the Order, was that:
>
> Calls should continue to be viewed as local exchange traffic terminating at the ESP's [Enhanced Service Providers'] location. Connectivity to a point out of state through an ESP should not contaminate the local exchange. (Order, p. 24) (ISPs are a subset of ESPs.).[2]

Following *WorldCom,* the Commission has consistently determined that the definition of "Local Traffic" in numerous interconnection agreements includes ISP calls.[3] In the case of

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[2]*In re: Complaint of WorldCom Technologies, Inc. against BellSouth Telecommunications, Inc., et al.,* Order No. PSC-98-1216-FOF-TP issued September 15, 1998 ("*WorldCom*").

[3]*In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. against GTE Florida Incorporated for breach of terms of Florida partial interconnection agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and request for relief,* Docket No. 980986-TP, Order No. PSC-99-1477-FOF-TP (Fla. P.S.C. July 30, 1999); *In re: Request for arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. regarding reciprocal compensation for traffic terminated to internet service providers,* Docket No. 981008-TP, Order No. PSC-99-0658-FOF-TP (Fla. P.S.C. April 6, 1999); *In re: Request for arbitration concerning complaint of ITC DeltaCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of interconnection terms, and requests for immediate relief,* Docket No. 991946-TP, Order No. PSC-00-1540-FOF-TP

arbitrations to establish prospective interconnection agreements, the Commission has most recently determined that ISP-bound traffic should be treated as local and established reciprocal compensation rates for the payment of ISP-bound traffic.[4]

In sum, the Commission has independent state authority under Chapter 364, Florida Statutes, to establish intercarrier compensation arrangements for the payment of ISP-bound traffic. That authority is codified in Section 364.162(1), Florida Statutes, and has been exercised by the Commission in a generic docket.[5]

Federal Law

Several sections of the federal Telecommunications Act of 1996 ("Act"), specifically, 47 U.S.C. §§ 251 and 252, recognize the authority of a state regulator such as this Commission to establish and enforce state-specific rules and regulations regarding how the regulator will apply the new, pro-competitive provisions of that Act. Section 251(d)(3) bars the FCC from precluding enforcement of state-specific interconnection regulations as long as they are consistent with and do not impede the purposes of the new federal law. Section 252(e)(3) expressly protects the rights of states to enforce state law in approving arbitrated or negotiated interconnection agreements. Section 261(b) states that nothing in this part of the new law (Sections 251-261):

(Fla. P.S.C. August 24, 2000); *In re: Complaint and/or perition for arbitration by Global NAPS, Inc. for enforcement of Section VI(B) of its interconnection agreement with BellSouth Telecommunications, Inc. and request for relief,* Docket No. 991267-TP, Order No. PSC-00-0802-FOF-TP (Fla. P.S.C. April 24, 2000).

[4]*In re: Petition by Global NAPS, Inc. for arbitration of interconnection rates, terms and conditions and related relief of proposed agreement with BellSouth Telecommunications, Inc.*, Docket No. 991220-TP, Order No. PSC-00-1680-FOF-TP (Fla. P.S.C. September 19, 2000).

[5]BellSouth witness Shiroishi agreed that any intercarrier compensation mechanism for ISP traffic should be accomplished through a generic docket (Tr. 662).

> shall be construed to prohibit any State commission from ... prescribing regulations after [enactment of the '96 Act] in fulfilling the requirements of [Sections 251-261] if such regulations are not inconsistent with the provisions of [Sections 251-261].

In recognition of this clear Congressional contemplation of a role for states in setting state-specific interconnection policies (as opposed to merely making case-by-case adjudications), the FCC repeatedly emphasized in the original *Local Competition Order* that the FCC's own rules could and should be supplemented by state-specific rules.[6] These FCC statements include the following:

> "[T]he states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition[. ... U]nder this partnership, the FCC establishes uniform national rules for some issues ... and the states adopt ***additional rules*** that are critical to promoting local telephone competition. The [FCC's rules] are ***minimum requirements upon which the states may build.***" *Local Competition Order* at ¶24. (Emphasis supplied).

> "[S]tates will help to illuminate and develop innovative solutions regarding many complex issues for which we have not attempted to prescribe national rules at this time, ***and states will adopt specific rules that take into account local concerns.*** We therefore ***encourage states*** to continue to pursue their own pro-competitive policies." Id. at ¶53. (Emphasis supplied).

> "Variations among interconnection agreements will exist, because parties may negotiate their own terms, [and] ***states may impose additional requirements that differ from state to state.***" Id. at ¶60. (Emphasis supplied).

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[6]In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

In these circumstances, there can be no question that the Commission may establish rules regarding inter-carrier compensation for ISP-bound traffic (and other matters) in a generic proceeding. State law authorizes this, and federal law expressly recognizes it.

The only situation in which the Commission would lack legal authority to establish generic rules governing compensation for ISP-bound calling would be if the FCC had exclusive jurisdiction to deal with such traffic. But even the FCC's vacated February 1999 *Reciprocal Compensation Order* did not go that far.[7] The *Local Competition Order* recognized that under the 1996 Act, the previous hermetic division between interstate and intrastate matters had been breached, in that the FCC would now have a role in certain intrastate matters, while states would have authority over interstate matters implicated in fulfilling their duties under Sections 251 and 251.[8] Even assuming that ISP-bound calls are in some sense "interstate," as the FCC contended in the *Reciprocal Compensation Order*, even the FCC did not attempt to assert **exclusive** jurisdiction over such calls in that order. Moreover, that order was vacated, so what really matters is not what the FCC said there, but what it had said before that vacated order was issued. As discussed *infra*, and as the Commission is aware, the FCC's traditional handling of ISP-bound calls **mandated** that they be treated for essentially all purposes as local, intrastate traffic. So even if the FCC could, in theory, assert exclusive jurisdiction over matters relating to ISP-bound calls, it clearly has not done so. As

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[7]Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, *Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in* CC Docket No. 99-68, CC Docket Nos. 96-98 and 99-68 (released February 26, 1999) ("*Reciprocal Compensation Order*"), *vacated sub nom. Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

[8]11 FCC Rcd 15499 at 15544, 15547 (sections 251 and 252 "address both interstate and intrastate aspects of interconnection, services, and access to unbundled network elements").

a result, under both state and federal law, this Commission may establish rules governing intercarrier compensation for such calls in this generic docket.

Confirmation of this conclusion is provided by the FCC's *Starpower* Order,[9] released in June 2000. That order lucidly illustrates the FCC's position that state commissions have the jurisdiction to rule whether reciprocal compensation for delivery of traffic to ISPs is compensable as local traffic. In *Starpower*, the FCC reviewed a finding by the Virginia State Corporation Commission ("Virginia Commission") that it should "take no action" on *Starpower*'s request to the Virginia Commission to resolve a dispute concerning the interpretation and enforcement of its interconnection agreement with Bell Atlantic - Virginia, Inc. ("Bell Atlantic") and GTE South, Incorporated (GTE). *Starpower* maintained that GTE and Bell Atlantic were required to pay compensation to *Starpower* for the delivery of ISP-bound traffic. In exercising its jurisdiction under the provisions of Section 252(e)(5), the FCC ruled that the dispute was within the state's responsibility and that the Virginia Commission failed to carry out its responsibility under Section 252 of the Act by refusing to address whether ISP traffic is local. The interpretation of whether ISP traffic is local traffic is not an issue that a state commission *may* decide, it is an issue that state commissions *must* decide.

Issue 2: Is delivery of ISP-bound traffic subject to compensation under Section 251 of the Telecommunications Act of 1996?

ALECs' Position: *Yes. ISP-bound traffic is local under FCC regulations. The ISPs may originate additional Internet communications, but that does not mean that ISP-bound calls do not terminate at the ISP. Also, this traffic must be deemed local to be consistent with FCC precedent.*

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[9] *Petition of Starpower Communications, LLC for declaratory judgment interpreting interconnection agreement with GTE South, Inc.*, Case No. PUC 990023, Final Order (June 14, 2000).

Issue 3: **What action should the Commission take, if any, with respect to establishing an appropriate compensation mechanism for ISP-bound traffic in light of the current decisions and activities of the courts and the FCC?**

ALECs' Position: *The Commission should rule that ISP-bound traffic is local traffic and require the originating carrier to pay the same per-minute rate for such traffic as applies to any other local traffic. Future court or FCC action can be accommodated when and if it occurs.*

We address these two issues together since they are intimately related legally. The issues surrounding ISP-bound calls are somewhat complex, but the Commission is familiar with them from arbitration and complaint cases involving BellSouth and various ALECs. To summarize, there seem really to be only four coherent arguments: (1) ISP-bound calls are local; (2) ISP-bound calls are not "really" local, but should be "treated as" local; (3) ISP-bound calls are not local and need not be treated as local, but the Commission may set inter-carrier compensation rules for them; and (4) The Commission lacks jurisdiction to set inter-carrier compensation rules for ISP-bound calls due to their (supposed) interstate nature. Each of these is addressed below.[10]

1. ISP-bound calls are local. We believe that this is the correct legal conclusion. As a technical matter, the evidence is clear that customers dial ISPs just like they dial any other business subscriber to local exchange service, such as a taxicab company, pizza parlor, or bank.[11] The ILECs' contrary position seems to be based on what ISPs do with incoming calls, *i.e.*, help their customers access the Internet. But the D.C. Circuit demolished this argument in *Bell Atlantic v. FCC*, when it vacated the FCC's *Reciprocal Compensation Order*. Specifically, the court twice admonished the

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[10]We say that these four arguments are "coherent" because each one is reasonably ***internally*** consistent. But we believe that only arguments (1) and (2) are actually consistent with applicable precedent (including, *Bell Atlantic)*, and sound policy.

[11]See Testimony of Lee L. Selwyn at Tr. 67-78.

FCC that the mere fact that ISPs initiate communications into the Internet on behalf of their customers — even when those communications take place effectively instantaneously — "does not imply that the original communication does not terminate at the ISP."[12] The court also specifically held that in an ISP-bound call, "the ISP" — not some distant web site — is "***clearly*** the called party."[13] *Id.* at 14. Since the ISP is the called party, and since the ISP's communications into the Internet on its customers' behalf do not support the conclusion that ISP-bound calls do not terminate at the ISP, the only logical conclusion is that ISP-bound calls are, indeed, local.[14]

Although this matter has been briefed to the Commission in other cases, it bears emphasis that the status of ISP-bound traffic as jurisdictionally interstate or intrastate is irrelevant to whether the call is "local" for purposes of Section 251(b)(5). These are simply two different questions involving two different legal considerations. The court in *Bell Atlantic* did not object to the use of the "end-to-end" test (which reflects the terms of 47 U.S.C. § 153(22), defining "interstate communication") to determine jurisdiction. It held, however, that it was illogical to conclude that the results of that separate statutory inquiry affected whether the reciprocal compensation model of Section 251(b)(5), as opposed to the access charge model, applied to a particular class of calls.[15]

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[12]*See* 206 F.3d at 7.

[13]*See* 206 F.3d at 6.

[14]Additional support for this conclusion comes from §§ 153(47) and 153(48) of the Communications Act, which define "telephone exchange service" and "telephone toll service," respectively. A call from one exchange to another can be either local (exchange service) or long distance (toll service); the distinguishing characteristic as far as federal law is concerned is whether the calling party pays a separate toll charge. Since ISP-bound calls are dialed (and charged) as local as opposed to toll calls, they would fall within the definition of "telephone exchange service," not "telephone toll service."

[15]*See* 206 F.3d at 6.

Second, the FCC itself held that for wireless traffic, all calls within a "major trading area" are local for compensation purposes, even though much such traffic is plainly interstate.[16] So interstate calls may be plainly be "local" as far as Section 251(b)(5) is concerned.

2. *ISP-Bound Calls Should Be Treated Like They Are Local.* Even if the Commission were to find that ISP-bound calls are not really local, the next most logical conclusion is that these calls should be ***treated like*** local calls. This conclusion follows from the fact that literally every time that the issue has come up, the FCC has held that ISPs are, or are to be treated like, end user customers, and ISP-bound calls are, or are to be treated like, normal, local, intrastate calls. The FCC has applied this rule at least in the context of access charges (ISPs are exempt);[17] universal service (ISPs are end users, not carriers, so they don't have to pay);[18] rights to interconnect with ILECs (ISPs are end users, not carriers, so they don't have Section 251 interconnection rights);[19] and separations (costs of handling ISP-bound calls are to be separated to the intrastate, not interstate, jurisdiction).[20]

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[16]*See Local Competition Order* at ¶ 1035.

[17]*See* Access Charge Reform, CC Docket No. 96-262, *First Report and Order,* 12 FCC Rcd 15982 (1997) at ¶¶ 341-45, *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 541-43 (8th Cir. 1998).

[18]*See* In the Matter of Federal-State Joint Board on Universal Service, *Report To Congress*, 13 FCC Rcd 11501 (1998) at ¶ 13 ("We conclude ... that the categories of 'telecommunications service' and 'information service' in the 1996 Act are ***mutually exclusive***."). *See id.* at ¶ 21 (footnote omitted) ("We find ... that Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications'.")

[19]*See Local Competition Order* at ¶ 995.

[20]*See Reciprocal Compensation Order* (vacated on other grounds by *Bell Atlantic v. FCC, supra*) at ¶ 36.

The one time the FCC departed from this practice — its February 1999 *Reciprocal Compensation Order* — the court vacated its ruling as lacking "reasoned decisionmaking." *Bell Atlantic,* 206 F.3d at 3. Notably, even in its ill-fated *Reciprocal Compensation Order,* the FCC acknowledged that the logical implication of these precedents was that ISP-bound calls should be treated as local for purposes of reciprocal compensation, too.[21] Indeed, it appears that the FCC's failure to follow these precedents is what led to a vacation of its order "for want of reasoned decisionmaking." This plainly suggests that this Commission would be on firm ground in ***following*** these precedents and, indeed, treating ISP-bound calls as local for purposes of reciprocal compensation. While we believe that ISP-bound calls ***are*** local under the relevant definitions, at an absolute minimum, the precedents cited above show that they should be ***treated like*** local calls for reciprocal compensation purposes.[22]

3. *ISP-Bound Calls Are Not "Local" But The Commission Can Still Set Rules Regarding Compensation For Them.* This is the position that the FCC took in ¶¶25-27 of the *Reciprocal Compensation Order,* and this is the proposition that the D.C. Circuit declined to address in *Bell Atlantic* given its difficulties with the FCC's basic conclusion that ISP-bound calls were not local at all. While we believe that ISP-bound calls are local, as noted above, we also believe that the

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[21]*Reciprocal Compensation Order* at ¶ 24 (referring to FCC's "longstanding policy of treating this traffic as local"); ¶ 25 ("we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic").

[22]Note, in this regard, that the D.C. Circuit specifically rejected arguments based on the FCC's precedents about the "two-call theory" as a ground for concluding that ISP-bound calls were not "local" for compensation purposes. *See BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.,* 97 F. Supp. 2d 1363, 1376-78 (N. D. Ga. 2000).

Commission has the authority under federal law to establish compensation rules for this traffic in any case. In this regard, as noted above, various sections of the Communications Act expressly acknowledge that states may establish rules regarding carrier-to-carrier interconnection that go beyond federal requirements, subject only to the caveat that the such rules may not be inconsistent with the Act or with existing federal rules.[23] It follows that this Commission may set rules for how ISP-bound traffic will be compensated even if that traffic is not subject to Section 251(b)(5) and even if it is not "local" traffic.

The ILECs focus on this particular approach because it gives them the greatest freedom to advance discriminatory and anticompetitive proposals. If ISP-bound calls either are, or are to be treated like, local calls, then existing FCC rules (a) require that the inter-carrier compensation rate be symmetrical based on the ILEC's own costs, see 47 C.F.R. §51.711, and (b) forbid mandatory "bill and keep" arrangements unless traffic is roughly balanced as between a given ILEC and a given ALEC, see 47 C.F.R. §51.713, which no one seriously suggests is the case today.[24] So the ILECs hope to persuade the Commission that ISP-bound calls fall into this third category, and that bill-and-keep, or some rate based on ALEC costs, is appropriate.

The Commission should reject these ILEC invitations to suppress competition and competitors. Under this legal approach, the Commission is, to some extent, writing on a clean slate

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[23]See discussion of Issues 1(a) and 1(b), *supra*, text at p. 6, fn. 8. So, even if ISP-bound traffic is "interstate," that does not mean that this Commission may not address how it is to be handled in interconnection agreements.

[24]The "rough balance" must exist between the ILEC and an individual ALEC before a bill-and-keep arrangement may be imposed on that ALEC. *See* 47 §51.713(b) (referring to traffic "from one network to the other").

with regard to compensation for these calls. But the slate is not really clean, because the FCC addressed many of the relevant issues in the *Local Competition Order.* With regard to bill-and-keep, when traffic is substantially out of balance, the carrier sending the traffic will be imposing costs on the carrier receiving it that are disproportionate to the costs that the other carrier has to bear. So, it just isn't fair to mandate bill-and-keep when traffic is out of balance. *See Local Competition Order* at ¶¶ 1,111-1,114. While under the legal theory under discussion the Commission is not literally ***bound by*** the FCC's rule banning bill-and-keep when traffic is out of balance, the fact remains that the rule is fair and sensible, essentially for the reasons discussed by the FCC.

With regard to symmetrical rates, the logic is even clearer. In a monopoly environment, the ILEC is the carrier of both first and last resort. An ISP that needs connections to the public switched network will obtain those connections from the ILEC and will cause the ILEC to incur certain costs in delivering calls to the ISP. Any competitor that can perform that same function — getting calls to ISPs — at less cost that it would take the ILEC to do it, using the ILEC's network architecture and switch configuration, should be encouraged to enter the market and do so.

The only way to achieve this result is to set up a regime where the new competitor will get paid a rate for its efforts that is based on the ***ILEC's*** costs. Such a rate sends exactly the proper signal to the market because it represents the cost that the ILEC would incur if the ALEC did not enter the market and do the work. If an ALEC can perform the work (here, delivery of calls to ISPs, but the principle is more general) more efficiently than the ILEC, it will enter the market and make profits. If it cannot, it will not enter the market at all. As a result, if an ILEC's costs are high relative to a truly efficient operation — or if the price is simply set too high due to a mis-estimate

of what those costs are — one would expect to see numerous ALECs entering into the market precisely because they can operate more efficiently. (See Tr. 94-95, Selwyn).

It makes no sense at all to punish efficient ALECs by conducting what amounts to a rate base, rate-of-return proceeding to set rates based on their own specific costs when they have the audacity to, *e.g.,* introduce new and more efficient technology to perform some particular function. To the contrary, what makes sense is to put economic pressure on the ILEC to ***adopt*** the new and more efficient technology as quickly as possible, so that its own costs come down, and the rate it must pay the ALEC comes down as well. In this respect, basing ALEC compensation rates on ILEC costs simultaneously (a) provides efficient "price cap"-type incentives to ALECs to adopt only the most efficient technical means (including both switch types and network architecture) to serve their customers and (b) provides ILECs with an incentive to adopt those same efficient measures in its own networks.

These considerations are what led the FCC to require inter-carrier compensation to be based on the ILEC's costs. *See Local Competition Order* at ¶¶ 1086-1089. As with mandatory bill-and-keep, even if the Commission is not literally ***bound by*** the analysis that led the FCC to require symmetrical rates, the fact remains that the FCC's analysis makes complete sense for handling compensation for ISP-bound calls, and the Commission should adopt it.

The effect of the ILECs' contrary arguments is clear. Now that ALECs have successfully competed for the business of ISPs, the ILECs want to deprive the ALECs of appropriate compensation for the work the ALECs do in delivering ISP-bound calls. (Tr. 690-692). Testimony in this case showed that ALECs would suffer significant competitive harm — by being forced to charge higher rates to their ISP customers. (Tr. 260, Falvey). Aside from damaging ALEC relations

with their customers, this would have a darker and more anti-competitive implication: the efficiencies that ALECs have been able to garner, and to include in their prices, would be lost, so that ALECs would lose their current efficiency-based pricing advantage over ILECs, leading ISPs to defect back to the ILEC for service. This would hardly be consistent with the pro-competitive purposes of the 1996 Act.

4. The Commission Lacks Jurisdiction To Establish A Compensation Mechanism For ISP-Bound Calls. A "hard-core" ILEC might argue that ISP-bound calls are really interstate, really not local, and that as a result this Commission simply has no authority to set inter-carrier compensation rules for them. This is obviously nonsense, however, so we will not tarry long in considering it.

Briefly, the high water mark of the ILEC regulatory war against compensation for ISP-bound calls appears, in retrospect, to be the FCC's February 1999 *Reciprocal Compensation Order.* In that ruling, the ILECs persuaded the FCC that ISP-bound calls really were primarily interstate and that this meant that ISP-bound calls really were not local. But even the FCC which accepted those propositions would not concur in the ILECs' claim that handling inter-carrier compensation arrangements for this traffic was somehow beyond the jurisdiction of the states. To the contrary, the FCC found, as noted above, that the 1996 Act contemplates that states will have the ability to decide inter-carrier disputes about interstate matters, and contemplates that states may set rules for inter-carrier interconnection arrangements that go beyond minimum federal requirements.[25] Moreover,

[25]The FCC's specific ruling in this regard is no longer legally valid — indeed, it is legally of no force and effect, since it was vacated. To "vacate" ... means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside. *Alabama Power v. EPA,* 40 F.3d 450, 456-57 (D.C. Cir. 1994) (internal quotes and

as indicated at the hearing, the FCC in its *Starpower* decision discussed above (preempting the jurisdiction of the Virginia commission, which declined to address disputes about ISP-bound calling) makes clear that the FCC still believes that states may and should address this issue in the course of handling matters arising under the 1996 Act. If the FCC had believed that states have no jurisdiction to deal with this question, it would not have had to go through the elaborate debate about whether to take the case over from the Virginia regulators; it would simply have said, in effect, "of course you can't handle this, and of course we will." The fact that the question of preemption required any consideration at all strongly counsels against a conclusion here that this Commission may not lawfully render a decision in this docket.

Issue 4: What policy considerations should inform the Commission's decision in this docket?

ALECs' Position: *To achieve equity, prohibit discrimination, and promote competition and innovation, the Commission should prescribe for ISP-bound traffic an explicit, volume-based compensation mechanism having a rate derived from the ILEC's TELRIC cost.*

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citations omitted). As *Schurz Communications v. FCC,* 982 F.2d 1043, 1055 (7th Cir. 1992), makes clear, when an agency order is vacated, the applicable regulatory rules and obligations, as a matter of law, bounce back to what they were prior to the effectiveness of the vacated ruling: If the court in that case "vacate[d] ... the part of the [FCC's] order repealing the 1970 rules[, those prior] rules would spring back into effect." *See also Action on Smoking and Health v. CAB,* 713 F.2d 795, 797 (D.C. Cir. 1983) (recognizing that vacating or rescinding regulations has the effect of reinstating prior regulations); *cf.* 49 C.J.S. Judgments § 357 (1997) ("Where a judgment is vacated or set aside by a valid order or judgment, it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered."). That said, there is a real difference between portions of the vacated ruling that the reviewing court specifically found wanting (*e.g.,* here, the FCC's conclusion that ISP-bound calls are not local) and portions that the reviewing court did not reach (*e.g.,* here, the FCC's conclusion that states have the authority to set rules for compensation for ISP-bound calls that do not conflict with federal requirements). Blindly relying on the former is somewhere between ill-advised and reversible error. *Cf. MCImetro Access Transmission Services, Inc., supra.* Carefully considering the validity of the latter and reaching an independent conclusion is a normal part of adjudication.

The Commission's decision in this docket should serve the policies of achieving equity, prohibiting discrimination, and promoting innovative and fair competition. If the Commission adheres to these policies here, it will treat all carriers fairly while also safeguarding affordable access to the Internet by Florida's citizens.

Equity demands an explicit compensation mechanism.

The starting point for an analysis of the application of the principle of equity to the subject of compensation mechanisms is a recognition that an originating caller is responsible for the full cost of getting local calls to their destinations, through the application of its serving LEC's local calling plan. This paradigm has been in effect for more than a hundred years. (Tr. 39, Selwyn). It is applicable to the treatment of ISP-bound traffic. (Tr. 31, 33, 40, 67, Selwyn).

The Commission should not be distracted by ILEC claims based on word games that reciprocal compensation payments are "costs" to the carrier making the payments. Such payments are not "costs" in the normal economic sense, but are instead *remittances of revenues* by one carrier to another. The latter carrier is entitled to receive these revenues by virtue of **it** having incurred a portion of the real economic costs of completing the call. (Tr. 42, Selwyn). The originating carrier makes these payments precisely because it has **not** incurred these costs, but has taken advantage of the fact that the terminating carrier did so. Again, this follows from the paradigm described above. The "originating" carrier receives from its customer the full payment for the origination and termination functions. With respect to calls made to an ISP that is the customer of another carrier, the carrier whose customer pays for local calling originates, but does not terminate, the call and so does not incur the costs of termination. Instead, it hands the call to the terminating carrier. To then

remit to the second carrier a portion of the payment is --not incurring a cost –but sharing revenues in recognition of costs incurred and services provided by the terminating carrier.

Nor should the Commission be taken in by claims that the ALEC serving an ISP should look to the ISP for the payment of access charges. The specialized access charge regime was created specifically for, and is applicable only to, the relationship between two *carriers.* (Tr. 46). Specifically, when a long distance call is given to a LEC to terminate, it is the IXC–not the originating caller–that is the customer of the LEC. As the *Bell Atlantic* court observed, ISPs are *users*, not carriers, of telecommunications services. 206 F.3d at 7. (Tr. 49, 52, Selwyn). This conclusion was consistent with decades of FCC rulings that access charges do not apply to ISPs and that ISPs are not carriers. While some ILEC witnesses claimed that ISPs really are carriers,[26] that conclusion on their part has no impact on the law as it now stands.[27] Accordingly, the access charge mechanism is inapplicable to the ISP. Requiring the terminating ALEC to increase the prices it charges to its ISP customers would have the perverse effect of artificially making the Internet less affordable to Florida's citizens at the same time it would allow the ILEC to retain revenues to which it is not entitled.

Because the century-old mechanism that witness Lee Selwyn called the "sent-paid" paradigm is the appropriate framework within which to analyze the relationship between the "originating"

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[26]*See* Tr. 775 (Taylor).

[27]Conceivably the FCC could choose to reverse its course of 18 years and decide that ISPs should pay access charges instead of intrastate local exchange rates when they buy their local exchange lines. If that occurred the entire issue of intercarrier compensation for ISP-bound calls would largely disappear. In the absence of such a radical revision of the charging arrangements in this industry, however, witness musings about how ISPs are "really" carriers should simply be disregarded.

carrier and the carrier that terminates calls to its ISP customers, the basic decision is whether or not the relationship calls for the creation of an explicit compensation mechanism. Equity requires that the question be answered in the affirmative. The arrangement will be equitable only if each carrier is compensated for the costs it incurs to provide the needed service. Here, equity can be achieved only with an explicit compensation mechanism that bases the compensation each receives on the volume of traffic that it terminates for the other.

The alternative to an explicit compensation mechanism is one in which each of the two carriers looks exclusively to the revenues it receives from its own customers–an arrangement called "bill and keep." As an equitable matter, the Commission should reject a "bill and keep" arrangement for ISP-bound traffic. The premise of "bill and keep" is that there is no need for payments between carriers because the traffic delivered by one for termination will offset that delivered by the other. This approach would be *equitable* only in the situation in which the traffic flow in one direction is equal to the traffic flow in another direction. Only in that rare and improbable circumstance would the costs of termination that Carrier A incurs for the benefit of Carrier B's customer exactly offset the costs of termination that Carrier B incurs for the benefit of Carrier A's customer. With respect to ISP-bound traffic, the ALECs frequently terminate more calls than the ILECs terminate for them. The imbalance can be severe, meaning that one carrier is incurring far more costs of terminating handed-off "incoming" calls than the other. In this context, then, the "bill and keep" approach almost invariably will lead to an inequitable result in which the carrier receiving and terminating the greater volume of calls, and thereby incurring the greater costs, is not fully compensated.[28] The

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[28]Indeed, as noted by Commissioner Palecki, implementation of a bill and keep mechanism "may do irrevocable damage to the ALECs...." (Tr. 528).

traffic flow in one direction is irrelevant to the compensation that should be paid as a result of traffic flowing in the other direction. (Tr. 58, 65, Selwyn). Equity requires that in this situation an explicit compensation mechanism–one that bases the payment one carrier receives on the volume of calls the carrier terminates for the other --be implemented.

The principle of equity demands an explicit compensation mechanism for other compelling reasons. The termination of calls constitutes a distinct and separate segment of the local exchange market in which the ILECs and ALECs compete. (Tr. 57, Selwyn). If an ALEC competes for and wins in the market a customer base characterized by large volumes of incoming calls, it is because the ILEC misjudged the market or the ALEC simply did a better job of attracting these customers. (Tr. 56, Selwyn). The ALEC having fairly won the role of terminating many calls in a competitive marketplace, it would be unfair and inequitable to deny the ALEC the revenues that are properly attributable to the service it is providing as a result of that success. An ILEC should not be permitted to escape the financial consequences of its failure to compete successfully by refusing to compensate other competing carriers for work that they have legitimately performed. (Tr. 59, Selwyn).

Intercarrier compensation for ISP calls would not constitute a windfall to the ALECs.

Although BellSouth admits that ALECs incur costs to transport and terminate ISP calls, BellSouth opposes the payment of compensation on the ground that compensation would provide a "windfall" to the ALECs. (Tr. 602, 627, 675, Shiroishi). BellSouth and Verizon claim that current flat rates for local service are significantly below the level of reciprocal compensation that would be required to be paid on a permanent basis if compensation is ordered. (Tr. 475-479, Beauvais; Tr.

603, Shiroishi). BellSouth characterizes itself in this proceeding as a financially strapped entity and cries out that the so-called "gravy train" must stop. (Tr. 627, Shiroishi).

In the case of BellSouth, the facts belie these claims. As Mr. Falvey pointed out, every residential customer presents an opportunity for significant revenue enhancement through such services as second lines, vertical services and switched access. (Tr. 266-268). Dr. Selwyn testified to the documented revenue growth that ILECs have enjoyed since 1990 due to rising sales of second residential lines. The testimony of Mr. Falvey and Dr. Selwyn was confirmed by BellSouth's 10-K Report filed with the Securities and Exchange Commission for calendar year 1999. (Exhibit 25).

BellSouth's 10-K Report, as well as the testimony, of Ms. Shiroishi, documented the following:

(1) That BellSouth believes it is probable that it has incurred a liability of approximately $400 million (as of the date of the hearing) in reciprocal compensation payments for ISP traffic (Ex. 25, at 34; Tr. 699).

(2) That BellSouth's local service revenue increased $854 million in 1999 due to the "growth in switched access lines and strong demand for digital and data services and convenience features." (Ex. 25, at 15).

(3) That secondary residence lines accounted for over 50% of the growth in residential access lines in 1999. (Ex. 25, at 16).

(4) That business access lines grew 25.4% during 1999 due to expanding demand for BellSouth's digital and data services. (Ex. 25, at 16).

(5) That revenues from optional convenience features such as custom calling features and voice mail service increased $275 million (16.8%) during 1999. (Ex. 25, at 16).

(6) That network access revenues grew $129 million in 1999 due largely to higher demand. (Ex. 25, at 16).

These facts demonstrate that contrary to the dire financial straits of many ALECs, BellSouth is enjoying enormously exploding profits. Nonetheless, BellSouth has elected to withhold some $400 million of reciprocal compensation payments to ALECs that BellSouth characterizes as a "probable liability." Moreover, BellSouth's attempt to segregate ISP calls as a separate cost and revenue feature of a residential customer's local service in support of its claim that it is losing money on ISP traffic ignores the true, total picture. The true picture, as plainly demonstrated by Mr. Falvey and confirmed by BellSouth's 10-K, is that residential lines are generators of significant, multiple sources of revenue which must be taken into account in evaluating the equities of requiring intercarrier compensation for ISP-bound traffic.

The mechanism should not discriminate on the basis of the content of the local call.

Fundamentally, the costs incurred to originate and terminate a call are not influenced by the content of the call or the motivation of the caller. (Tr. 67, Selwyn). Technically, there is no difference in the manner in which an "ordinary" end-user-to-end-user call is handled, as compared to the call from an end-user to an ISP: the processes of production (i.e. switching, transport) for ISP-bound traffic are identical to those used to produce other local calls. (Tr. 68-70, Selwyn). From the originating customer's perspective, an ISP-bound call is dialed like any other local call. Further, and again from the originating customer's perspective, the ISP-bound call is "covered" under the appropriate local calling plan of the LEC that serves the caller. (Tr. 71, Selwyn). In fact, ILECs regard and treat their own ISP customers as local. (Tr. 72, Selwyn). Again, an ISP is a user of telecommunications services, not a provider of telecommunications services. Because an ISP-bound

call terminates at the ISP's POP, the call is as local in nature as any other. To apply a compensation methodology to ISP-bound traffic that differs from that applied to other local calls would be to discriminate unfairly against ISP-bound traffic on the basis of the content of the call. To prohibit such discrimination, the Commission should require ILECs to apply to ISP-bound traffic the same mechanism and rate that they apply to other local traffic.

A symmetrical rate based on the ILEC's TELRIC cost is needed to ensure and promote fair competition.

One of the primary public policy goals of introducing competition into the local telecommunications market is specifically to encourage and stimulate innovation in the nature of the services that are being offered. To that end, the Commission should adopt a rate that discourages gamesmanship and motivates carriers to reduce their costs. If this is done, competition will flourish.

The entire premise of local competition is that the individual choices of competitors in the marketplace trying to meet consumer demand will provide a better result overall than dictating particular results by means of top-down regulation. Carriers should be free to compete for terminating services, originating services, or both.

To the extent that an ILEC misjudges a market or fails to compete, it may experience an economic loss. To adopt a compensation mechanism designed to protect an ILEC from its mistakes or failures would be to intervene artificially in the operation of competitive markets. Above, it was pointed out that to deny an ALEC the fruits of marketplace victory by withholding the revenues that are attributable to the services it provides would be patently inequitable. This result would also have the undesirable effect of discouraging the type of competition and innovation required to succeed in a competitive market.

Similarly, an ILEC should not be able to "game" the system by strategically overstating or understating its termination cost. To promote fair competition, the Commission should require a symmetrical rate derived from the ILEC's TELRIC cost. Importantly, this rate will render the ILEC indifferent, economically, as to whether it or an ALEC terminates a call. (Tr. 93, 94, Selwyn). It will also encourage all providers to lower their costs, thereby stimulating competition and innovation. (Tr. 94).

For the foregoing reasons, the policy considerations of equity, non-discrimination and the promotion of competition require that the Commission prescribe an explicit, volume-based compensation mechanism for ISP-bound traffic.

Issue 5: Is the Commission required to set a cost-based mechanism for delivery of ISP-bound traffic?

ALECs' Position: *Yes, as required by Section 252(d)(2) of the Act. The appropriate intercarrier compensation for the termination and transport of ISP-bound local calls, as well as other forms of local traffic, is a symmetric rate based upon the ILEC's prevailing TELRIC cost level.*

The Commission is required to set a cost-based mechanism for delivery of local traffic, including ISP-bound local calls, under Section 252(d)(2) of the Act. This section provides that a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless the terms and conditions provide for the mutual reciprocal recovery by each carrier of costs associated with transport and termination of calls that originate on another carrier's network. Section 252(d)(2) further states that the terms and conditions are just and reasonable if those terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. (Tr. 230, Falvey).

The FCC has determined that the rates for reciprocal compensation for the exchange of local traffic should be presumptively symmetric and based upon the ILEC's costs, unless an ALEC believes that its own costs are higher, in which case it could file its own TELRIC-based cost study. (47 C.F.R. 51.711(b), Tr. 91, Selwyn). No ALEC rebutted this presumption or filed a TELRIC-based cost study for consideration in this proceeding; therefore, the Commission is precluded from considering the ALECs' costs in this proceeding and is required to establish symmetrical reciprocal compensation rates based upon the ILEC's costs. (Tr. 292, Falvey).

Whether or not the Commission determines that the FCC's reciprocal compensation rules are directly applicable to local ISP-bound calls, their underlying economic justification applies with equal force. (Tr. 92, Selwyn). First, Section 252(d)(2)(ii) of the Act requires that inter-carrier charges for the transport and termination of traffic must reflect "a reasonable approximation of the additional costs of terminating such calls." (*Local Competition Order* at para. 1072). The TELRIC-based approach as defined by the FCC satisfies this requirement, because Section 252(d)(2)(ii) does not require precise identification of each carrier's call termination costs, but instead a reasonable approximation is afforded by the ILEC's forward-looking cost level. (*Local Competition Order* at para. 1085; Tr. 92-93, Selwyn). Second, adopting a symmetric rate based upon the ILEC's TELRIC cost level minimizes the ILEC's incentive for strategic gaming of its termination rate. If the ILEC's claimed costs are too high, the symmetric rate would create opportunities for ALECs to pursue customers with high volumes of inbound traffic. If the ILEC understates its costs, the ALECs could pursue outbound traffic-oriented customers. (Tr. 93, Selwyn). The ILEC's TELRIC cost level represents the ILEC's avoided cost of termination, which would otherwise be incurred by the ILEC; consequently, if it is used to establish a symmetric termination rate, the ILEC should be indifferent

as an economic matter to whether it or an ALEC completes the ISP-bound calls. (Tr. 94). Finally, use of a symmetric rate based upon the ILEC's TELRIC cost levels creates incentives for all carriers to find innovative ways to reduce their costs below that level. (Tr. 95, Selwyn; 254, Falvey).

Contrary to BellSouth's and Verizon's contentions, bill-and-keep would be an inappropriate compensation mechanism for delivery of ISP-bound traffic (or, for that matter, any other traffic that is out of balance). The premise of bill-and keep is that the incurred costs cancel each other out, and would only be equitable in the situation where traffic was balanced. (Tr. 872, Fogelman). Carriers that have to terminate more traffic would be forced to pass these costs on to their own customers, even though their customers did not directly cause these costs to be incurred. (Tr. 862, Fogelman). If a bill-and-keep mechanism were adopted this could result in customer erosion for a carrier and a decline in competition in the industry. (Tr. 862, 883, Fogelman). Such an economic effect would take place regardless of whether the traffic is labeled local or interstate. (Tr. 872, Fogelman).

Under the FCC rules, the Commission can only implement a bill-and-keep mechanism if it makes a finding that the traffic is roughly balanced. (47 C.F.R. 51.713). If the Commission finds that Sections 251 and 252 apply, BellSouth concedes that a bill-and-keep mechanism cannot be reached if the traffic is not roughly balanced. (Tr. 694, Shiroishi). To implement a bill-and keep mechanism, the Commission would need to examine on a carrier-by-carrier basis whether the traffic was roughly balanced rather than declaring it balanced in a generic proceeding. (Tr. 428-429, Hunsucker). Because the record shows that traffic is not balanced,[29] the Commission is precluded under the FCC's rules from establishing a bill-and-keep mechanism for the delivery of ISP-bound

[29]*See* Tr. 311, Falvey; 393, 398-399, 422, Hunsucker; 881, Fogelman.

traffic and must set symmetrical rates based on the ILEC's TELRIC-based cost for reciprocal compensation.

Accordingly, the Commission should determine that the appropriate inter-carrier compensation for the termination and transport of ISP-bound local calls, as well as other forms of local traffic, is a symmetric rate based upon the ILEC's prevailing TELRIC cost level, because a symmetric rate creates incentives for continual reduction in the costs of call termination services and harms neither the ILECs nor end users. (Tr. 96, Selwyn).

Issue 6: What factors should the Commission consider in setting the compensation mechanisms for delivery of ISP-bound traffic?

ALECs' Position: *The Commission should consider that a "sent-paid" arrangement has been traditionally applied to local traffic, there is no technical difference or practical means of differentiating between ordinary local and ISP-bound calls, and differences between ALEC and ILEC networks lead some ALECs to seek economies of specialization in order to compete.*

There are several factors which the Commission should consider in setting the compensation mechanisms for delivery of ISP-bound traffic, including the following: (a) A "sent-paid" compensation arrangement has traditionally been applied to local telecommunications traffic; (b) there is no technical difference in the manner by which traffic is terminated at a conventional voice telephone line and traffic that is terminated to an ISP; (c) there is no practical means for reliably differentiating between "ordinary" calls and those that are terminated to ISPs; (d) material differences exist between ALEC transport and switching networks and ILEC networks both with respect to their architecture and their design; and (e) differences between ILEC and ALEC network architectures, as well as the substantially smaller scale of ALEC operations, are key sources of cost differences between the two types of carriers, and lead some ALECs to seek economies of specialization in order to compete. (Tr. 28-97, Selwyn). Based upon these enumerated factors, the

appropriate inter-carrier compensation for the termination and transport of ISP-bound local calls, as well as other forms of local traffic, is a symmetric rate based upon the ILEC's prevailing TELRIC cost level, which creates incentives for continual reductions in the costs of call termination services and harms neither ILECs nor end-users. (Tr. 90, Selwyn; Tr. 231, Falvey).

The almost universal practice in Florida, as well as generally throughout the United States, is for local calls to be provided on a sent-paid basis by the local exchange carrier on whose network the call originates, meaning that the customer who originates the calls pays his or her local carrier to get the local call from the point of origin all the way to its intended destination. (Tr. 31, 37, Selwyn). Most importantly for the purposes of this proceeding, under the sent-paid framework the costs of terminating the call are paid in full by the call originator to the carrier that originates the call, so the recipient of the call need not and should not make any additional payments for the termination of that call. (Tr. 31, 37, Selwyn). When two interconnecting carriers jointly complete a call, the originating carrier is responsible for remitting a portion of the sent-paid revenue to the carrier that terminates the call. Reciprocal compensation is simply the payments made by the first (originating) carrier to the second (terminating) carrier for its work in completing the calls.

Under the sent-paid framework, when the exchange of traffic between two carriers is roughly equal, carriers may elect a "bill and keep" system, thereby eliminating the need for explicit inter-carrier payments. (Tr. 33, Selwyn). However, explicit reciprocal compensation payments must be made for call termination when inter-carrier traffic flows are significantly out of balance, in order to ensure that each carrier is properly compensated for the termination work that it performs. (Tr. 33, Selwyn). Assuming that ISP-bound calls are subject to reciprocal compensation, then in each direction compensation must be paid for the work performed by the terminating carrier and thus the

volume of traffic that may or may not flow in the reverse direction is not relevant to the matter of the terminating carrier's entitlement to reciprocal compensation payments for its work in completing calls.

The proposals of BellSouth and Verizon to replace reciprocal compensation for ISP-bound calls with a "bill-and-keep" arrangement are fundamentally incompatible with the sent-paid arrangements used for locally-rated calls. (Tr. 115-116, Selwyn; 606, Shiroishi; 462, Beauvais). These proposals entirely ignore the fact that a bill-and-keep system is only appropriate when inter-carrier traffic flows are roughly in balance, so that explicit payments for call termination would generally net out. To the extent that the ISP-bound traffic exchanged between two carriers is strongly one-directional, a bill-and-keep system would fail to compensate the carrier that terminated the bulk of the exchanged traffic.

In order for the Commission to adopt a bill-and-keep regime for ISP-bound traffic exchanged between carriers, the Commission would have to implement procedures that it was confident could accurately identify all ISP-bound calls and distinguish them from all other types of locally-rated calls. (Tr. 76-77, 117-118, Selwyn). However, there is no practical method available at this time to support any sort of differential treatment of ISP-bound calls for reciprocal compensation purposes. (Tr. 73, 118, Selwyn). Moreover, application of traffic imbalance adjustments to a regime of explicit reciprocal compensation payments would be inequitable and discriminatory, and should not be considered by the Commission. (Tr. 119-120, Selwyn). Under an explicit reciprocal compensation regime, the appropriate compensation for calls terminated by one of two interconnected carriers is entirely independent from the volume of traffic and associated compensation flowing in the reverse direction. (Tr. 62-65, 119-120, Selwyn).

Some ILECs have made the argument that reciprocal compensation arrangements with ALECs should make a distinction between traffic that is destined for (terminated at) a conventional voice telephone line and traffic that is terminated to an ISP. In fact, there is no technical difference in the manner by which these two types of traffic are handled in the ILEC's network and by suggesting otherwise, such ILECs are attempting to introduce a market-driven price discrimination based upon the *use* to which local telephone service is put rather than upon the processes by which it is produced or the costs incurred in its production. (Tr. 34-35, Selwyn). Furthermore, it is a sheer impossibility for ILECs to accurately identify ISP-bound calls even if a discriminatory pricing regime were to be adopted, which it should not. (Tr. 35, Selwyn). Even if it could be done, there is no basis for differentiating between ISP-bound and other types of calls. The ILECs' costs to transport calls from their point of origin to the hand-off point is not affected in any manner by the nature of the call (the voice vs. data, ISP-bound vs. ordinary local calling) or by its content (Internet data vs. ordinary voice conversation). (Tr. 78, Selwyn).

ALEC transport and switching networks differ materially from ILEC networks both with respect to their architecture and design. (Tr. 35, 81, Selwyn). ILECs such as BellSouth serve millions of individual subscribers statewide and can thus afford to deploy relatively efficient, large-scale switching systems in close geographic proximity to their customers. (Tr. 84, Selwyn). ALECs typically serve a customer population that is a minute fraction of the size of the ILEC's customer base. In order to achieve switching efficiencies, ALECs will typically deploy a relatively small number of large switches, and so must transport their customers' traffic over relatively large distances. (Tr. 84, Selwyn). ILECs have been consolidating multiple switches into large main frame/remote configurations. In the case of ALECs, the substantially smaller scale of the customer

base and traffic load makes any other approach infeasible as an economic matter. (Tr. 84-85, Selwyn).

Differences between ILEC and ALEC network architectures, as well as the substantially smaller scale of ALEC operations, are key sources of cost differences between the two types of carriers. (Tr. 86, Selwyn). Because they are necessarily forced to operate at a far smaller scale, ALEC networks may exhibit higher average costs than ILEC networks. These higher average costs may be offset in some cases if the ALEC is able to achieve economies of specialization. From this perspective, ALECs that have concentrated their marketing efforts thus far on customers that receive calls, may be attempting to achieve economies of specialization, precisely to offset the cost disadvantages associated with relatively small scale and limited scope. (Tr. 87, Selwyn). The effects of these scale and scope economics are further compounded by the fact that ILECs are able to purchase switching, transport, and other network components at a far more favorable price than their much smaller ALEC rivals. (Tr. 88, Selwyn). Moreover, ALECs are more likely to experience higher capital-related costs in the absence of the volume discounts available to large ILECs, and an ALEC's capital-related costs will also tend to exceed the corresponding ILEC item, due to the substantially greater level of risk that investors reasonably ascribe to ALECs. (Tr. 89, Selwyn).

The appropriate inter-carrier compensation for the termination and transport of ISP-bound local calls, as well as other forms of local traffic, is a symmetric rate based upon the ILEC's prevailing TELRIC cost level, which creates incentives for continual reductions in the costs of call termination services and harms neither ILECs nor end-users. (Tr. 90, Selwyn). The FCC's rules for reciprocal compensation for the exchange of local traffic reflect its determination that the rates applied for reciprocal compensation purposes should be presumptively symmetric and based upon

on the ILEC's costs, unless an ALEC believes that its own costs are greater. 47 C.F.R. § 51.711(b). The applicable FCC Rules define the "forward-looking economic cost" that is to be the basis for pricing, in terms of the FCC's "total element long run incremental cost" (TELRIC) methodology plus a reasonable allocation of forward-looking common costs. 47 C.F.R. §§ 51.505 and 51.511.

Whether or not the Commission determines that the FCC's reciprocal compensation rules are directly applicable to local (or for our present purposes, at least toll-free) ISP-bound calls, their underlying economic justification applies with undiminished force. (Tr. 92, Selwyn). The ILEC's TELRIC cost level represents the ILEC's avoided cost of termination, which would otherwise be incurred by the ILEC. (Tr. 94, Selwyn). Consequently, if it is used to establish a symmetric termination rate, the ILEC should be indifferent as an economic matter to whether it or an ALEC completes the ISP-bound calls. In addition, use of a symmetric rate based upon the ILEC's TELRIC cost level creates incentives for all carriers including ALECs, to find innovative ways to reduce their costs below that level. (Tr. 94, Selwyn).

The FCC correctly viewed the possibility of ALECs lowering their own termination costs below the symmetric rate (and thereby receiving payments higher than their forward-looking economic costs) as a positive development and a consequence of competition and innovation. (Tr. 95, Selwyn). To the extent that certain ALECs are deploying advanced switching technologies designed to efficiently provide high-volume inward calling services, they simply are responding to the economic incentives created by the FCC's symmetric rule, and by succeeding in this market, they are showing that the rule is in fact promoting competition. (Tr. 95, Selwyn).

Issue 7: Should intercarrier compensation for delivery of ISP-bound traffic be limited to carrier and ISP arrangements involving circuit-switched technologies?

ALECs' Position: *No. There is no reason or basis for limiting intercarrier compensation for delivery of ISP bound traffic to only circuit switched technology. To deny compensation for this traffic penalizes competitive carriers for providing innovative services and using current technology.*

In 1995, the Florida Legislature significantly amended Chapter 364, Florida Statutes, to introduce competition in the telecommunications industry. In section 364.01(3), the Legislature found

> . . . that the competitive provision of telecom services, including local exchange service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation and encourage investment in telecommunications infrastructure (emphasis supplied.

Notwithstanding this clear expression of intent to encourage technological innovation, the ILECs are urging this Commission to deny compensation to ALECs because they are using innovative and emerging technology in the provision of service. There is no basis for concluding that one technology should be treated differently than others as shown by the evidence and testimony presented by the ALECs.

To receive benefits of non-circuit switched technology, customers still must initially utilize the circuit switched network and the equipment used by carriers is the same. Costs are incurred by ALECs in completing the transport and termination of non-circuit switched traffic thus the ALEC should be compensated for this function. Witnesses for the ILECs acknowledge that there are costs associated with this function but they would deny any compensation when an ALEC employs non-circuit switched technology. (Tr. 576-578, Jones).

The position advanced by the ILECs is tantamount to punishing the ALEC for utilizing new and innovative technology. Despite acknowledging that it is difficult to separate circuit from non-circuit switched traffic, Verizon nevertheless would deny any compensation when an ALEC employs non-switched technology (Tr. 573, Jones). Neither of the ILEC parties offer any substantive reasons for making such a distinction based on technology but BellSouth complains that it simply adds to the "gravy train."

During cross-examination, Mr. Falvey acknowledged the likelihood that the next generation of technology will be more efficient than current technology. (Tr. 324). He also agreed that future technology will probably reduce costs. (Tr. 324). There really was not any general disagreement on these points from any party's witness, including Verizon's (Tr. 568). It is the fact that ALECs are able to utilize this emerging technology that underlies the ILEC position.

Both Mr. Falvey and Verizon recognize that there are costs incurred when completing both circuit and non-circuit switched traffic (Tr. 321, 5). The ILECs' objection to there being compensation for non-circuit switched traffic appears to be related only to the "gravy train" (Tr. 635) as characterized by BellSouth and the "unwarranted subsidy," as Verizon calls it. Their solution is to deny any compensation thus creating a barrier to the development and use of emerging technology. During the hearing this was highlighted in a series of questions from Commissioners Palecki and Jaber to the Verizon witness. (Tr. 558, et. seq.). At one point Commissioner Palecki asked ". . . it would be arguable, would it not, that if every time we see a new technology come into play we reduce the revenues that can be made by either an ALEC or ILEC that we might be discouraging this sort of competition and this sort of implementation of new technologies." (Tr. 559, 560).

Commissioner Palecki's insightful question illustrates precisely the position of the ILECs — despite the fact there are costs associated with handling both circuit and non-circuit switched traffic, the ILECs want to deter the introduction of new technology by reducing — or in this case denying — compensation.

The ALECs submit that there is no basis for limiting compensation to circuit switched technology. To do so would inject artificial barriers to development of compensation, deny the recovery of costs and would be contrary to the expressed legislative intent of Chapter 364.

Issue 8: Should ISP-bound traffic be separated from non-ISP bound traffic for purposes of assessing any reciprocal compensation payments? If so, how?

ALECs' Position: *No. There is no need to separate ISP from non-ISP bound traffic. The routing of a call to an ISP is technically the same as routing a call to any number and the cost characteristics are the same. Furthermore, there is no current method to reliably and accurately separate the traffic.*

Calls to an ISP are initiated by an end user in the same manner as any other local bound traffic is originated. A customer dials the number of an ISP and to the end user the call appears to be a local call and from a technical point the call is handled in the same manner (Tr. 277, 279, Falvey). Moreover, since the traffic is technically identical, the costs for handling ISP bound traffic are likewise the same. The nature or content of a call does not affect the costs to transport a call from the point of origin to the hand-off point. Because of the similarity of traffic, there is no way to reliably or accurately distinguish between ISP bound traffic and non-ISP bound traffic. Neither the ALECs nor the staff support the separation of traffic.

The ILECs urge the Commission to separate ISP bound from non-ISP bound traffic but their methodology is based on assumptions and guesswork. All of their analyses consist of after-the-fact

reviews and are speculative at best. Moreover, as noted by Dr. Selwyn, there are no characteristics of a call that would uniquely mark it as being an ISP bound call. (Tr. 75-80, Selwyn).

BellSouth describes a method of searching for and dialing up numbers to verify tones which is both time consuming and expensive but then acknowledges that because they have not been able to get ISP numbers they resort to "guessing" by looking at duration of calls and "call characteristics." (Tr. 131, 134, Scollard). While there was not any vigorous disagreement that ISP bound calls tend to be longer in duration than non-ISP bound calls, that criterion alone would capture the calls between teenagers and other long duration calls such as those made by telecommuters, those made to paging carriers and other similar types of calls. (Tr. 75-76, Selwyn).

Verizon has suggested that an approach similar to the PIU factor could be utilized (Tr. 529-532, Beauvais), but that too depends upon speculation and guesswork. It is much more difficult to distinguish between calls on the local network than from local and non-local traffic thus there is more speculation involved when trying to distinguish between ISP and non-ISP traffic.

Sprint witness Mr. Hunsucker also addressed this issue and described several methods for separating traffic but concluded that none are workable. He points out, as does Dr. Selwyn and Mr. Falvey, that the methods proposed by the ILECs are administratively burdensome, expensive and unworkable. (Tr. 376-378).

Based on the testimony and evidence in this proceeding, there is no basis for separating ISP from non-ISP bound traffic. All of the methods proposed by the ILECs require the application of an indirect method to back into a separation and no party has demonstrated that any of these methods has any degree of reliability. The evidence reflects that ISP and non-ISP traffic is handled in the same manner and the cost characteristics are the same. No ILEC presented any cost information to

suggest otherwise. There is simply no sound evidentiary basis or justification to single out ISP bound traffic from other local traffic.

Issue 9: Should the Commission establish reciprocal compensation mechanisms for delivery of ISP-bound traffic to be used in the absence of the parties reaching an agreement or negotiating a compensation mechanism? If so, what should be the mechanism?

ALECs' Position: *In the absence of agreement by two interconnecting carriers, the Commission should require ISP-bound traffic to be compensated on the same basis as all other local traffic, at a rate based on the ILEC's forward-looking cost of transporting and terminating local traffic.*

Under Sections 251 and 252, carriers first try to negotiate interconnection arrangements before bringing disputes to the Commission. *See* 47 U.S.C. §§ 251(a)(1), 252(a). As the FCC observed, however, these are not normal commercial negotiations in which each party has something the other party wants; instead, the ILEC is negotiating the terms and conditions under which it will assist competitors in undermining the ILEC's traditional monopoly control of the local exchange market, and have no motivation to actually assist their competitors. *Local Competition Order* at ¶ 55. For this reason, the FCC found that the public interest — and, in particular, the public interest in promoting the development of competition — is served by establishing pro-competitive rules that define what will happen on particular topics if the parties cannot agree. *Id.*

This logic applies fully to compensation for ISP-bound calls. As noted above, there are various legal theories under which the Commission may act, but the result is the same under all of them. If the Commission concludes that ISP-bound calls either "are" local, or must be "treated like" local, then the only real question is whether the Commission wants to establish a unitary per-minute rate for local traffic (as the parties to this brief recommend, *see* below) or establish a two-part rate

structure, *i.e.,* initial minute/subsequent minute charges (as recommended by Sprint witnesses, Hunsucker, Tr. 372-375 and Staff witness Fogelman, Tr. 866-867).

If the Commission concludes that ISP-bound calls are neither "really" local nor necessarily to be "treated like" local, the fact remains, as established in Dr. Selwyn's testimony, that the logical result from an economic perspective is to subject these calls to the same compensation regime to which local traffic is subject. That is, jurisdictional metaphysics aside, these calls are economically equivalent to local calls at all relevant points: the end user making the call dials ISPs on a local basis; the traffic is handled by both the ILEC and ALEC networks as local; and the ISP buys local, intrastate business service from the ALEC to connect to the network. Again, the only possibly economically meaningful difference between ISP-bound calls and other calls that might be relevant for compensation purposes is the fact that ISP-bound calls tend to be of longer duration than traditional voice calls. ILECs, however, have no incentive to agree to any payment at all for ISP-bound calls; they will do so only when confronted with actual or threatened adverse regulatory decisions. *See Local Competition Order* at ¶ 55. The Commission, therefore, should announce a default inter-carrier compensation rule for ISP-bound calls even under this legal theory.[30]

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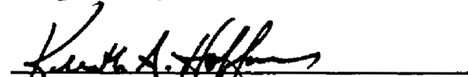
[30]The Commission clearly has the authority to impose such a state-specific rule. This is so even though the FCC's *Reciprocal Compensation Ruling* that held that such power existed has been vacated and is of no legal effect. This is because the statute itself expressly acknowledges and protects state authority to establish interconnection rules, terms, and conditions that are not inconsistent with federal law. *See* 47 U.S.C. §§ 251(d)(3); 252(e)(3); 261(b); 261(c). Indeed, the FCC has long recognized the role of states in fashioning state-specific interconnection-related rules that are not inconsistent with federal requirements. *Local Competition Order* at ¶¶ 24, 53, 54, 58, 60, 66 (all affirming that the FCC's rules are minimum requirements which states may supplement). Obviously, if the Commission concludes that it has no jurisdiction to address these calls at all — which it should not, *see supra* Issue No. 2 — then the question of establishing a compensation rule for them is moot.

The parties to this brief urge the Commission to establish a single per-minute rate applicable to all ISP-bound calls and other local calls alike.

In this regard, a two-part rate structure would, at least in the short run, benefit the ILECs by cutting their payments to ALECs serving ISPs. It follows that the ILECs would have a strong incentive to come forward with sound evidence supporting a cost-based two-part rate for intercarrier compensation. The only reason the ILECs have not come forward with this sort of detailed cost evidence, we submit, is that they are still trying to win "the big one," *i.e.,* obtain a ruling from the Commission that they do not have to pay for ISP-bound calls ***at all.*** Once the Commission eliminates that as an alternative — and affirms that the compensation rate will be based on ILEC costs, not ALEC costs — the ILECs will return to the Commission seeking to establish a rational cost-based rate structure for intercarrier compensation. Until the ILECs attempt such proof, the Commission is compelled by the record in this proceeding to adopt a unitary per-minute rate.

Respectfully submitted,



Kenneth A. Hoffman, Esq.
Martin P. McDonnell, Esq.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302
(850) 681-6788 (Telephone)
(850) 681-6515 (Telecopier)

Attorneys for AT&T Telecommunications of the Southern States, Inc., TCG of South Florida, MediaOne Florida Telecommunications, Inc., and Allegiance Telecom of Florida, Inc.

Jon Moyle, Esq.
Cathy Sellers, Esq.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

Christopher W. Savage, Esq.
Coles, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W.
Washington, DC 20006
Attorneys for Global NAPS, Inc.

Peter Dunbar, Esq.
Karen Camechis, Esq.
P. O. Box 10095
Tallahassee, Florida 32302-2095
Attorneys for Time Warner Telecom of Florida, L.P.

Michael Gross, Esq.
246 East 6th Avenue
Tallahassee, FL 32303
Attorney for Florida Cable Telecommunications, Inc.

Morton J. Posner, Esq.
Regulatory Counsel
Allegiance Telecom, Inc.
1150 Connecticut Avenue, N.W., Suite 205
Washington, DC 20036
Attorney for Allegiance Telecom of Florida, Inc.

Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
117 South Gadsen Street
Tallahassee, FL 32301
Attorneys for Florida Competitive Carriers Association

Donna Canzano McNulty, Esq.
325 John Knox Road, Suite 105
Tallahassee, FL 32303-4131

Richard D. Melson, Esq.
Hopping Green Sams & Smith, P.A.
P. O. Box 6526
Tallahassee, FL 32314
Attorneys for WorldCom, Inc.

Norman Horton, Jr., Esq.
Messer Law Firm
215 S. Monroe Street, Suite 701
Tallahassee, FL 32301-1876
Attorneys for e.spire Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 18th day of April, 2001:

Felicia Banks, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard, Room 370
Tallahassee, Florida 32399-0850

Elizabeth Howland
Allegiance Telecom, Inc.
1950 Stemmons Freeway, Suite 3026
Dallas, TX 75207-3118

Morton Posner, Esq.
Regulatory Counsel
Allegiance Telecom, Inc.
1150 Connecticut Avenue, N.W., Suite 205
Washington, DC 20036

Ms. Nancy B. White
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556

James Meza, III, Esq.
BellSouth Telecommunications, Inc.
Legal Department
150 West Flagler Street, Suite 1910
Miami, Florida 33130

James C. Falvey, Esq.
e.spire Communications, Inc.
133 National Business Parkway, Suite 200
Annapolis Junction, MD 20701

Michael A. Gross, Esq.
Florida Cable Telecommunications, Asso.
246 East 6th Avenue
Tallahassee, FL 32303

Mr. Paul Rebey
Focal Communications Corporation of Florida
200 North LaSalle Street, Suite 1100
Chicago, IL 60601-1914

Global NAPS, Inc.
10 Merrymount Road
Quincy, MA 02169

Scott Sapperstein
Intermedia Communications, Inc.
3625 Queen Palm Drive
Tampa, Florida 33619-1309

Donna Canzano McNulty, Esq.
MCI WorldCom
325 John Knox Road, Suite 105
Tallahassee, FL 32303-4131

Norman Horton, Jr., Esq.
Messer Law Firm
215 S. Monroe Street, Suite 701
Tallahassee, FL 32301-1876

Jon Moyle, Esq.
Cathy Sellers, Esq.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

Herb Bornack
Orlando Telephone Company
4558 SW 35th Street, Suite 100
Orlando, FL 32811-6541

Peter Dunbar, Esq.
Karen Camechis, Esq.
P. O. Box 10095
Tallahassee, FL 32302-2095

Charles R. Rehwinkel, Esq.
Susan Masterton, Esq.
Sprint-Florida, Incorporated
Post Office Box 2214
MS: FLTLHO0107
Tallahassee, FL 32316

Mark Buechele
Supra Telecom
1311 Executive Center Drive, Suite 200
Tallahassee, Florida 32301

Kimberly Caswell, Esq.
Verizon Select Services, Inc.
P. O. Box 110, FLTC0007
Tampa, Florida 33601-0110

Charlie Pellegini, Esq.
Patrick K. Wiggins, Esq.
P. O. Drawer 1657
Tallahassee, Florida 32302

Robert Scheffel Wright, Esq.
John T. LaVia, III, Esq.
P. O. Box 271
Tallahassee, FL 32302

Wanda G. Montano, Esq.
US LEC Corporation
Morrocroft III
6801 Morrison Boulevard
Charlotte, NC 28211

Carolyn Marek
Time Warner Telecom of Florida, L.P.
233 Bramerton Court
Franklin, TN 37069

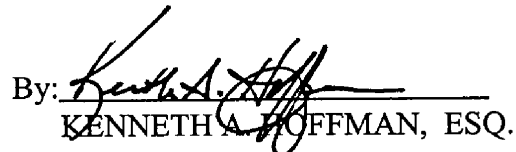
Joseph A. McGlothlin, Esq.
Vicki Gordon Kaufman, Esq.
117 South Gadsen Street
Tallahassee, FL 32301

Michael R. Romano, Esq.
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, Colorado 80021

Marsha Rule, Esq.
AT&T
101 North Monroe Street, Suite 700
Tallahassee, FL 32301-1549

Richard D. Melson, Esq.
Hopping Green Sams & Smith, P.A.
P. O. Box 6526
Tallahassee, FL 32314

Christopher W. Savage, Esq.
Coles, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W., Ste. 200
Washington, DC 20006

By: 
KENNETH A. HOFFMAN, ESQ.

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